Supreme Court, U.S.
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CASE #

In The

Supreme Court Of The United States

OCTOBER TERM 2004

ROSEMARY PARMAR,

PETITIONER

VS.

CALIFORNIA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPERIOR COURT, COUNTY OF SACRAMENTO, APPELLATE DEPARTMENT

PETITION FOR WRIT OF CERTIORARI APPENDIX

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THE QUESTIONS PRESENTED FOR REVIEW

Whether, in view of *Morissette v. United States*, 342 U.S. 246 (1952) and *Staples v. United States*, 511 U.S. 600 (1994) a sentence in a misdemeanor offense under California's Health and Safety Code can, when there is no jury instruction on *mens rea*, or the jury instruction is based on "strict liability", the court has jurisdiction to impose a period of incarceration?

In view of the double jeopardy clause of the 5th Amendment, and California public policy regarding substandard housing, and Penal Code, § 654, were there in fact only two counts, one for each motel, rather than the 163 counts found true for which a sentence could be imposed?

In a case where the defendant is claiming a void judgement, is there an abuse of discretion, amounting to a denial of due process of law under the 14th Amendment to deny a timely motion to permit a sentencing hearing under California Penal Code, § 1204?

In view of *Andrews v. The Police Court Of The City Of Stockton*, 21 Cal. 2d 479 (1943); accord, *People* v. *Zolotoff*, 48 Cal.App.2d 360, 364; *People* v. *Carkeek*, 35 Cal.App.2d 499, 505; P.C., § 1466, subd. 2b, did the Appellate Department in the first instance, and the Third District Court of Appeal in the second instance, deny petitioner due process of law under the 14th Amendment in failing to hear her appeal under California Penal Code Section 1466(2)(b) on the merits?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

There is no published opinion in this case.

The denial of discretionary review by the California Court of Appeal, Third District is set forth in the appendix, p. A1. The order denying rehearing and transfer to the California Court of Appeal, Third District is set forth at page A5. The decision of the California Superior Court, County of Sacramento, Appellate Department is set out at page A4.

JURISDICTIONAL STATEMENT

1. The decision by the California Court of Appeals, Third district, was filed on October 21, 2004. Appendix, p. A1

2. Petitioner believes that 28 U.S.C. § 1254(1) and 2101(c) and Supreme Court Rule 13.1 probably confer *jurisdiction* on this court because the petition seeks review of an action within 90 days of the entry of an order denying a petition for discretionary hearing with the highest State Court having jurisdiction to review. California Rules of Court, Rules 28[1] and 64.[2]

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[1] Rule 28. Petition for review

(a) Right to file a petition, answer, or reply (1) A party may file a petition in the Supreme Court for review of any decision of the Court of Appeal, including any interlocutory order, **except the denial of a transfer of a case within the appellate jurisdiction of the superior court.**

[2] Rule 64. Transfer

(a) Authority to transfer on Court of Appeal's own motion or a party's petition

The Court of Appeal may order transfer of a case on the court's own motion or on a party's petition to transfer.

(b) Petition to transfer

(1) If the appellate division denies an application for certification and does not certify its opinion for publication, a party

STATUTORY PROVISIONS INVOLVED

California Code of Civil Procedure, § 1085

California Health and Safety Code § 17912

California Health and Safety Code, § 17920.3

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY.

The complaint was originally filed on September 18, 1997. The final, trial, amended complaint was filed on April 30, 2000. In summary, the complaint alleges:

P.C., § 370, criminal nuisance; Sacramento County Code (hereinafter, SCC) 16.20.200(a), 107 counts; SCC 16.20.200(b), 25 counts (renting substandard dwelling); SCC 16.20.200(c), 53 counts (failing to obey Notice and Order to correct); SCC 16.20.200(d), 24 counts (re-renting without County approval of repairs); SCC 16.20.100, 5 counts (trash); SCC 16.20.130, 2 counts, (inadequate amount of dumsters.2 CT, p. 645.

The case was tried, and verdicts entered on May 15, 2002. 1 CT[3], pp. 239 – 376.

The jury found the Petitioner guilty as to all counts, except the following: 23, 25, 31, 34, 71, 78, 80, 127, 189, 192, 194, 233, 246. Hung: 7, 179, 191, 239.

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may serve and file in the Court of Appeal a petition to transfer the case to that court.

(2) The petition must be served and filed within eight days after the appellate division judgment is final in that court and must show delivery of a copy to the appellate division.

(3) The petition must explain why transfer is necessary to secure uniformity of opinion or to settle an important question of law.

(4) Within seven days after the petition is filed, any other party may serve and file an answer.

(5) The petition and any answer must comply as nearly as possible with rule 28.1.

[3] Because of the earlier appeal, the following will be utilized: RT and CT refer to the record from the earlier appeal. RTJS and CTJS refer to the record on this appeal.

A timely notice of appeal (hereinafter Appeal 1) was filed on Jun 26, 2002. That appeal was dismissed for multiple failures to prosecute, file a timely brief, filing a non-conforming brief without a motion for leave to file an oversize brief, and asking for relief from the default without adequately explaining the delay, or requesting leave to file an oversized brief.

On remand, the parties appeared for sentence and judgment on April 29, 2004, with new counsel. RT Judgment and Sentence (hereinafter, RTJS), p. 2) Each of the issues raised herein were presented, and further time requested for a formal sentencing hearing.

B. SUMMARY OF MATERIAL FACTS.[4]

1. The Prosecution's Case.[5]

Prakash and Rosemary Parmar were the owner/operators of the Rolling Green Motel on Auburn Blvd. from February of 1994, until December of 1997. From 1996 until 1997, they were also the owner/operators of the Ritz Motel, adjacent to the Rolling Green.

From February 6, 1996 through 1997, there were a total of six inspections of the two properties. During those inspections, violations noted were gas leaks, electrical overloading, and broken and cracked receptacles, exposed wiring, unsafe water heater hook-ups, cracked toilets, leaking toilets, cockroach infestation, deteriorated sheetrock and flooring, exposed metal piping, structural problems with staircases and second floor railings, and unsafe, or non-existent heating units. Also noted were unacceptable accumulations of rubbish throughout the property. The reports generally indicate upon each

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[4] Petitioner at this point is merely summarizing the record most favorably for the prevailing party, without admitting the truth of the facts asserted.

[5] Taken from the Probation Report. CT 44.

subsequent inspection, not only were further violations found, but also previous violations noted had not been repaired. As a result of the inspections, a total of 250 misdemeanor Counts were initially filed, including maintaining a criminal public nuisance, owning substandard housing, renting substandard housing to others, failure to obey a notice and order for repairs, and rerenting without a subsequent inspection.

2. The Defense's Case.

This case is not here on the merits, but rather whether jurisdiction existed to impose a period of incarceration. What follows are what petitioner believes were factors in mitigation.

During the relevant period, Petitioner did cause to have reinspections at her own expense when the City failed or refused to do the subsequent inspections on 3/14/96, 4/11/96, 4/26/96, 5/20/96, 5/23/96, 7/25/96, 7/1/96, 6/27/96, 6/17/96, 8/22/96, 8/2/96, 8/8/96, 9/26/96, 9/4/96, 9/16/96, 9/23/96, 9/15/97, 9/15/97, 10/20/97, 10/9/97, 10/6/97. Defendant's Exhibit 78; Supp. CT, 10/23/03 (hereinafter, Supp. CT), pp. 704 – 725 (Date at bottom of page next to signature). They also incurred great expense, $14,378.16, on 6/3/97 in correcting problems. Defendant's Exhibit 113; Supp. CT 726.

Petitioner filed and served a number of exhibits relevant to factors in mitigation. Judgment and Sentence CT (hereinafter CTJS), p. 64. The co-defendant has suffered heart problems. CTJS, pp. 66 - 69. Petitioner no longer owns the property. CTJS pp. 71 – 73. The property was lost through bankruptcy proceedings. CTJS, pp. 75 – 91. Four minor children remain at home in need of parental care. CTJS, p. 89:7-11.

3. Instructions on Mental Element[6]

Over objection of trial counsel (4 RT, pp. 587 – 595) the court gave the following instructions:

P.C., § 373a, criminal nuisance; CALJIC 3.30,[7] 3.31.5.[8] RT 464. Counts: 1. Third Amended Complaint, CT 491.

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6 The following counts were dismissed: 5, 14 – 21, 87, 36, 92, 93, 38, 40, 42, 45, 47, 49 - 51, 54 – 57, 59, 61 – 68, 94 – 97, 99, 102, 103, 120, 137, 138, 147 – 150, 163, 167, 169, 171, 176, 185 – 188, 190, 215, 222, 223, 229, 236, 242, 245, 247 and 256 for insufficient evidence. evidence. CT 245 and 442. (Both appear to be the same).

7 "CONCURRENCE OF ACT AND GENERAL CRIMINAL INTENT [¶] In the crimes of 1) Maintaining or Permitting a Nuisance (Pen. Code section 373a), 2) Failing to Obey a Written Notice and Order (Sac. Co. Code Sec. 16.20.200(c) ,), 3) Renting a Dwelling Unit which is Subject to a Notice and Order Without a Reinspection and Approval (Sac. Co. Code Sec. 16.20.200(d) ,), and 4) Allowing the Accumulation of Rubbish (Sac. Co. Code Sec. 6.20.130,), there must exist a union or joint operation of act or conduct and "general criminal intent." General criminal intent does not require intent to violate the law. When a person intentionally does that which the law declares to be a crime, he or she is acting with general criminal intent, even though he or she may not know that his or her act or conduct is unlawful.

8 "MENTAL STATE [¶] In the crimes of Failing to Obey a Notice and Order (Sac. Co. Code Sec. 16.20.200(c) ,), Renting a Room Subject to a Prior Notice and Order Without Reinspection (Sac. Co. Code Sec. 16.20.200(d) ,), and Public Nuisance (Pen. Code Sec. 373a), there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists the crime to which it relates is not committed.

"In the crime of Failing to Obey a Notice and Order (Sac. Co. Code Sec. 16.20.200(c) ,), the necessary mental state is knowledge of the Notice and Order.

"In the crime of Renting a Room Subject to a Prior Notice and Order Without Reinspection (Sac. Co. Code Sec. 16.20.200(d) ,), the necessary mental state is knowledge of the Notice and Order.

SCC 16.20.200(a), CALJIC 3.33.[9] (Strict Liability) CT 465. Counts: 2 – 4, 6, 8, 10, 12, 22, 24, 26, 28, 29, 30, 32, 33, 35, 37, 39, 40, 43, 44, 46, 48, 52, 53, 58, 60, 69, 73, 77, 83, 85, 89, 98, 101, 105, 106, 108, 114, 116, 118, 124, 129, 133, 134, 139, 144, 145, 146, 151, 152, 153, 154, 155, 156, 157,159, 160, 161, 162, 165, 166, 168, 169, 172, 177, 179, 181, 183, 189, 191, 194, 196, 198, 201, 204, 207, 206, 207, 210, 211, 213, 216, 224, 227, 230, 232, 234, 237, 240, 243, 248. Third Amended Complaint, CT 491-622.

SCC 16.20.200(b) CALJIC 3.33. (Strict Liability CT 465. Counts: 70, 74,78, 81, 90, 125, 127, 139, 192, 199, 202, 205, 208, 211, 214, 217, 220, 225, 228, 235, 241, 244. Third Amended Complaint, CT 491-622.

SCC 16.20.200(c) CALJIC 3.30, 3.31.5. RT 464. Counts: 9, 34, 71, 75, 79, 84, 86, 100, 104, 107, 109, 112, 115, 117, 119, 121, 122, 123, 130, 174, 178, 180, 182, 212, 221, 231, 233, 239, 246. Third Amended Complaint, CT 491-622.

SCC 16.20.200(d) CALJIC 3.30, 3.31.5. RT 464. Counts: 72, 80, 82, 88, 91, 131, 132, 136, 164, 173, 175, 183, 195, 200, 203, 206, 209, 218. Third Amended Complaint, CT 491-622.

SCC 16.20.100. No instruction given. RT 464-465. 76, 82, 113, 126, 128, 140, 158, 184, 197, 158, 184, 197, 249. Third Amended Complaint, CT 491-622.

"In the crime of Public Nuisance (Penal Code Sec. 373a), the necessary mental state is knowledge of the reasonable notice from the Health Officer."

9 "ACT ALONE-NO INTENT INVOLVED [¶] In the crimes alleging maintaining substandard housing (Sac. Co. Code Sec. 16.20.200(a) ,) and renting substandard housing (Sac. Co. Code Sec. 16.20.200(b) ,), the doing of the act itself is a crime. The intent with which the act is committed is immaterial to guilt"

SCC 16.20.130. CALJIC 3.30. Counts: 141, 250. Third Amended Complaint, CT 563, 621.

4. Sentence Imposed

Six months on Count 1 in the County Jail, credit of one day. Six months, consecutive, on Count 2. Six months, work furlough recommended, consecutive, on Count 9. Six months, consecutive to Counts 1, 2, and 9, on Count 70. The total therefore is two years. RTJS, p. 12:5-12.

C. ISSUES.

1. In view of *Morisette* and *Staples*, did the trial court have jurisdiction to impose incarceration in view of the fact that the matter was submitted to the jury on a theory of strict liability?

2. In view of California public policy regarding substandard housing, were there in fact only two counts, one for each motel, rather than the 163 counts found true for which a sentence could be imposed?

3. In view of the public policy which grants a defendant a right to a P.C., § 1204 hearing, did the trial court abuse its discretion in refusing to hold a P.C., § 1204 hearing?

D. SUMMARY OF ARGUMENTS

1. In view of *Morisette* and *Staples*, the trial court did not have jurisdiction to impose jurisdiction in view of the fact that the matter was submitted to the jury on a theory of strict liability.

2. In view of California public policy regarding substandard housing, there were in fact only two counts, one for each motel, rather than the 163 counts found true for which a sentence could be imposed.

3. In view of the public policy which grants a defendant a right to a P.C., § 1204 hearing, the trial court did abuse its discretion in refusing to hold a P.C., § 1204 hearing.

4. In view of *Andrews v. The Police Court Of The City Of Stockton*, 21 Cal. 2d 479 (1943); accord, *People* v. *Zolotoff*, 48 Cal.App.2d 360, 364; *People* v. *Carkeek*, 35 Cal.App.2d 499, 505; P.C., § 1466, subd. 2b, the Appellate Department in the first instance, and the Third District Court of Appeal in the second instance, denied petitioner due process of law under the 14th Amendment in failing to hear her appeal under California Penal Code Section 1466(2)(b) on the merits.

E. REMEDY SOUGHT.

Modification of the sentence imposed, in light of the record as a whole, to eliminate the period of incarceration, or remand for resentencing according to the opinion of this court, after a P.C., § 1204 hearing.

SUMMARY OF REASONS FOR GRANTING WRIT

1. The court imposed a sentence of incarceration on counts for which a strict liability instruction was given that appears to conflict with *Morissette and Stables* such that it would be a void sentence, an important issue escaping review in this court that should be clarified at this time.

2. Had the court properly assessed the true number of counts under the applicable standard, there was in fact only two counts, one for each substandard motel, which would have limited the maximum range of incarceration to more than one year.

REASONS IN SUPPORT OF CERTIORARI

I.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF LAW REGARDING SENTENCING ON AN OFFENSES FOR WHICH THE JURY WAS IN STRUCTED ON LIABILITY, WHICH HAS ESCAPED REVIEW IN THE PAST AND NEEDS TO BE, AND SHOULD BE, RESOLVED AT THIS TIME

A. THIS COURT HAS EXPRESSED DOUBT THAT INCARCERATION IS PERMITTED IN STRICT LIABILITY CASES.

In *Morissette v. United States*, 342 U.S. 246 (1952)[10] and *Staples v. United States*, 511 U.S. 600 (1994)[11] the U.S. Supreme Court left for another day the exact

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[10] A number of cases cite *Morissette* as follows: *Kansas v. Creamer*, 26 Kan. App. 2d 914 (2000), 996 P.2d 339 (statute imposes absolute liability for involuntary manslaughter while driving under the influence of alcohol; conviction affirmed); *McCallum v. Maryland*, 81 Md. App. 403 (1990), 567 A.2d 967 (driving infractions with no more than a fine are strict liability; driving with a suspended license which carries with it incarceration requires knowledge of suspension); *Michigan, v. Lardie*, 452 Mich. 231 (1996), 551 N.W.2d 656 (DUI is strict liability; voluntary manslaughter while DUI is not, but requires proof of DUI.; *New York v. Patterson*, 185 Misc. 2d 519 (2000), 708 N.Y.S.2d 815 (Failure to register as sex offender; strict liability; however proof of knowledge of duty to register must be established); *Washington v. Bash*, 130 Wn.2d 594 (1996), 925 P.2d 978 (owner of DOG which aggressively attacks and causes severe injury or death of a human; statute silent as to the mental element; State must prove beyond a reasonable doubt that the defendant either knew or should have known that his or her dog was a potentially dangerous or dangerous dog as an element of the crime.); *United States v. White Fuel Corporation*, 498 F.2d 619 (1st Cir. 1974)) (Oil spill; hazardous waste regulations; strict liability; conviction limited to $1,000.00 fine; no incarceration); *Northern Wind, Inc. v. William M. Daley*, 200 F.3d 13 (1st Cir. 2000) (appeal from civil penalty assessed against Northern Wind pursuant to 16 U.S.C., § 1858; possession of nonconforming Atlantic sea scallops under the Magnuson--Stevens Fishery Conservation and Management Act; no scienter required; judgment affirmed).

[11] Only two cases were found citing *Staples* as follows: *Ohio v. Jordan*, 89 Ohio St. 3d 488 (2000), 733 N.E.2d 601 (Unlawful possession of dangerous ordnance; knowledge required); *Washington v. Bash*, 130 Wn.2d 594 (1996), 925 P.2d 978 (owner of DOG which aggressively attacks and causes severe injury or death of a human; statute silent as to the mental element; State must prove beyond a reasonable doubt that the defendant either knew or should have known that his or her dog was a potentially dangerous or dangerous dog as an element of the crime.)

contours of submitting misdemeanor health and safety code violations to a jury on a theory of strict liability.[12] Other jurisdictions have reached a variety of results, but the majority of the jurisdictions considering the matter have held that incarceration for regulatory offenses submitted on a theory of strict liability is reversible error.[13] One jurisdiction has opined that

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12 Strict liability offenses include, not only those that are regulatory, public offenses, or mala prohibita, but also those designed to protect children. See generally, 1 Wharton's Criminal Law, § 23.021 (1993); LaFave, CRIMINAL LAW (3rd Ed. 2000).There appears to be confusion as to the limitations on the power to impose strict liability. *Morisette, supra.*

13 C.f., *Pennsylvania v. CSX Transportation, Inc.*, 653 A.2d 1327 (1995) (The Commonwealth appealed dismissal the criminal information charging CSX with violating the Fish and Game Code; the statute imposes strict liability; penalties limited to fine; fine of $10 per fish killed is not e xcessive.); *United States v. White Fuel Corporation*, 498 F.2d 619 (1st Cir. 1974) (Oil spill; hazardous waste regulations; strict liability; conviction limited to $1,000.00 fine; no incarceration); *Northern Wind, Inc. v. William M. Daley*, 200 F.3d 13 (1st Cir. 2000) (appeal from civil penalty assessed against Northern Wind pursuant to 16 U.S.C., § 1858; possession of nonconforming Atlantic sea scallops under the Magnuson--Stevens Fishery Conservation and Management Act; no scienter required; judgment affirmed); *Ward v. Coleman*, 598 F.2d 1187 (10TH Cir. 1979) (appeal from a judgment in an action seeking recovery of civil penalties assessed by the United States Coast Guard (Coast Guard) pursuant to the Federal Water Pollution Control; The basic issue confronted is: Whether the civil penalties prescribe in sub-part (b)(6) are, in reality, criminal in nature thereby precluding use of a compelled report made pursuant to sub--part (b)(5) of § 1321; held: statute imposes strict liability; penalty was punitive rather than regulatory; 5th Amendment precluded use of self-reporting to determine penalty) *with Connecticut v. Swain*, 245 Conn. 442 (1998), 718 A.2d 1 (Driver's License suspension; strict liability; minimum sentence of 30 days incarceration; affirmed); *Oregon v. Guthrie*, 85 Ore. App. 164 (1987), 735 P.2d 1279 (Operating motor vehicle without PUC permit; strict liability; a violation is punishable by up to 90 days in jail.); *United States v. Hamel*, 551 F.2d 107 (6th Cir. 1977) (willful is charge of gasoline onto a navigable waterway; for a violation of the Refuse Act, section 411 provides for a fine not

the legislative branch is free to define whatever crimes it wishes, with or without a mental element, that provides for incarceration.[14] Two federal jurisdictions disagree about the scope of strict liability penalties without scienter.[15] The Court itself has rejected strict liability. *Colautti v. Franklin*, 439 U.S. 379 (1979) (Abortion; vagueness; fails to inform as to what conduct is unlawful); *Liparota v. United States*, 471 U.S. 419 (1985) (Food stamp fraud; knowledge required; strict liability rejected).

From the foregoing, it appears that the majority of jurisdictions considering the issue have found that incarceration for a strict liability offense is not an option.

It follows therefore that the imposition of incarceration for those counts submitted on strict liability by the court below, counts 2 and 70, ante at pages 6 and 6, are bad as the court did not have jurisdiction to impose incarceration for those counts.

It therefore requires this court to settle this important issue of law, and remand to the court below for resentencing.

B. THIS COURT HAS HELD THAT WHERE TWO THEORIES ARE SUBMITTED TO THE JURY,

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exceeding $2,500 nor less than $500 or by imprisonment for not less than thirty days nor more than nor more than one year or both. The Refuse Act has been interpreted as a strict liability statute.); *United States v. White Fuel Corporation*, 498 F.2d 619 (1st Cir. 1974).

[14] *Quinn v. Florida*, 751 So. 2d 627 (1999) (Cites: *United States v. Freed*, 401 U.S. 601 (1971), 607; *United States v. Balint*, 258 U.S. 250 (1922) (sex offender; failure to register; legislature has the power to dispense with the element of intent and punish particular acts without regard to mental element.)

[15] c.f., *United States v. Anton*, 683 F.2d 101 (1982) (finds scienter requirement for incarceration) with *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968) (no scienter requirement; incarceration ok).

ONE OF WHICH IS INVALID, THEN DEFENDANT IS ENTITLED TO THE BENEFIT OF THE DOUBT

The court below in fact gave two types of instructions, and omitted any instruction on a third type. In the first, the court gave a strict liability instruction, discussed above. As to the second type, the court gave a "mental element" instruction. Supra, at pp. 5, 6, 6, 7. In the third type, the court failed to instruct at all. Supra, page 6.

A constitutionally deficient reasonable-doubt instruction cannot be harmless error. *Sullivan v. Louisiana*, 508 U.S. 275, 277–282 (1993). "When a case is submitted to a jury on alternative theories the unconstitutionality of any one of the alternatives requires the conviction to be set aside" (*citing Bachellar v. Maryland*, 397 U.S. 564 (1970), 571.). Where there is but a single jury instruction claimed to be ambiguous and therefore subject to an erroneous interpretation, the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."(*Boyde v. California*, 494 U.S. 370 (1990), 378-381.)

C. IT APPEARS THAT THE COURT LOST JURISDICTION TO IMPOSE INCARCERATION

An examination of the instructions as a whole raises a serious question on whether the jury applied the challenged instructions in a way that prevented consideration of constitutionally relevant evidence.

In this case, there is an overlap between the counts. As to Count 1, nuisance, that is based on the conditions found at the premises. If the jury, in reaching its decision, found the nuisance good because of the conditions submitted on strict liability, then Count 1 must necessarily fall. At this juncture, there is no way for this court, or anyone else to know, the basis of the jury's decision, hence imposition on

that Count would be barred, and therefore the court lost jurisdiction to impose incarceration. *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277–282; *Boyde v. California*, 494 U.S. 370 (1990), 378-381.)

It is also true that to the extent that those counts charging a violation of SCC 16.20.200(c) and (d) that rely upon the existence of a violations SCC 16.20.200(a) and (b), the same analysis applies, and incarceration based on those counts must fall.[16] *Ibid.*

While not relied upon for sentencing, but will be an issue if there is a remand, it goes without saying that those counts for which no mental element instruction was given, ante, at pp 6, cannot be the basis for incarceration. *Sullivan, supra.*

Petitioner did not seek a reversal on the merits, but rather sought to hold the court to the record made, which precludes incarceration based on strict liability because the instructions as a whole would permit the

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[16] Disobedience to a court order may be contempt, but not disobedience to an agency decision in view of the right to (1) judicial review (C.C.P., § 1085; 5th Amendment due process and taking clauses) and (2) due process right to an evidentiary hearing (*Freedman v. Maryland*, 380 U.S. 51 (1965) (Obscenity; government must promptly seek judicial relief prior to enforcement); *Lynch v. HFC*, 409 U.S. 538 (1971) [Prejudgment garnishment; void without prior determination of probability of outcome]; *Mitchell v. W.T. Grant, Co.*, 416 U.S. 600 (1974) [*Ex parte* writ of *sequestration*; valid because issued only on verified complaint and judicial approval]; *North Georgia Finishing, Inc. v. Di-Chem*, 419 U.S. 601 (1974) [Pre-judgment writ of garnishment; violative of due process; debtor required to post bond prior to hearing]; *Fuentes v. Shevin*, 407 U.S. 67 (1972) [Prejudgment *replevin*; invalid; issued on clerk's approval]) Furthermore, while Sacramento County draws support for SCC 16.20.200(a) & (b) from H&S C., § 17920.3 (see, CT p. 240, Count 2), it has no support for 16.20.200(d) & (e) (see, CT, p. 244 Count Seven). It is axiomatic that local agencies have no power other than those expressly granted by the Constitution or the legislature. *See generally, Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal.3d 28 (1974), and its *progeny.*

jury to apply the challenged instructions in a manner that was improper.

Thus, this Court should grant review, settle this important issue of law, and remand for further proceedings not inconsistent with this Court's opinion.

II.

CALIFORNIA PUBLIC POLICY IS TO ELIMINATE SUBSTANDARD BUILDINGS; THE NUMBER OF ROOMS INVOLVED MAY INDICATE A SUBSTANDARD BUILDING; BUT EACH FAULT FOUND DOES NOT JUSTIFY A SEPARATE COUNT

There is no case law on present building codes, and how they should be enforced.[17] The public policy, as stated by the Legislature, is that a violation of any portion of the building makes the building substandard, not the room, or portion thereof.[18]

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17 "Rules and regulations promulgated pursuant to the provisions of this part and building standards published in the State Building Standards Code, relating to the erection or construction of buildings or structures, shall not apply to existing buildings or structures or to buildings or structures as to which construction is commenced or approved prior to the effective date of the rules, regulations, or building standards, except by act of the Legislature, but rules, regulations, and building standards relating to use, maintenance, and change of occupancy shall apply to all hotels, motels, lodging houses, apartment houses, and dwellings, or portions thereof, and buildings and structures accessory thereto, approved for construction or constructed before or after the effective date of such rules, regulations, or building standards." Health and Safety Code (Hereinafter, H&SC) § 17912. The record does not reflect that the People ever proved that the codes cited were applicable to these particular motels.

18 "Any building or portion thereof including any dwelling unit, guestroom or suite of rooms, or the premises on which the same is located, in which there exists any of the following listed conditions to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants thereof

H&SC, § 17920.3. Accordingly, it would appear that rather than 230 "counts" there is evidence of 230 violations that makes each of the motels substandard, hence only two counts.

General principles of criminal procedure have developed rules to define when conduct is multiple or single in nature. See, Penal Code (P.C.) § 654.[19] The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one." *In re Adams*, 14 Cal. 3d 629 (1975), 632; *accord, Neal v. California*, 55 Cal. 2d 11 (1960), 18; *followed in People v. Liu*, 46 Cal.App.4th 1119 (1996), 1134 – 35.

The California public policy regarding substandard housing is to cause its rehabilitation or force it off the market. H&SC, § 17920.3. Each of the offenses are at the same location, constituting a continuing course of conduct, over a period of time, but amounting to one offense for each of the two substandard motels.

As such, faults found in each room, cumulatively, may point to a fact that the motel is substandard, but that substandard condition is but one offense, not multiple offenses.

Accordingly, it would appear that there were only two counts that the court could have sentenced on, not the multiple counts relied on by the court below, and therefore, either modification or reversal and remand for resentencing was required.

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shall be deemed and hereby is declared to be a substandard building: *****" H&SC, § 17920.3.

19 "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bar prosecution for the same act or omission under any other." P.C., § 654.

Whether this issue is properly before the court is debatable, but important because in the first instance, the Court's below were clearly given an opportunity to review the federal issue properly raised below, and if this court reverses and remands on the Federal question clearly before the court, petitioner will have an opportunity to revisit the issue below.

III.

DEFENDANT HAD A RIGHT TO A SENTENCING HEARING; THE COURT ABUSED ITS DISCRETION

There is a strong public policy granting a defendant the right to a P.C., § 1204 hearing. *In re Miller,* 176 Cal. App. 2d 75 (3rd DCA. 1959). In *People v. Neal,* 97 Cal.App.2d 668, 676-7 (1950), it was held that section 1204 of the Penal Code "requires the court in determining the consequences of guilt to receive evidence either in mitigation or aggravation of the punishment to be imposed. The statute [§ 1204] demands that the duty of determining the question of aggravation or mitigation of punishment be performed with scrupulous fairness to the [***7] defendant." By his plea of guilty petitioner admitted all the essential elements of the crime, but the severity of his punishment remained within the province of the trial court. The court failed to receive any evidence whatever on the matter of punishment, and in fact merely followed the suggestions made to it by the deputy district attorney. It cannot therefore be contended reasonably that petitioner did not suffer prejudice ..."

The original probation report recommended minimal incarceration. CT 46. A request for such a hearing was requested. RTJ&S, p. 9:22-23.

Defendant was prejudiced. In a hearing, defendant would have been able to show the absence of any actual physical injury to any person as a result of the conditions at the motels. Declaration of Rosemary

Parmar in Support of Motion to Augment, filed 7/1/04.[20] The medical record shows that the husband is being treated for a heart problem. CTJ&S, p. 66 – 69. There are 5 children that need parental care such that the period of incarceration adversely affects the children.

It would appear that trial court abused its discretion, and in the face of the record the court should not have ordered incarceration. Whether this issue is properly before the court is debatable, but important because if this court reverses on the Federal question clearly before the court, petitioner will have an opportunity to revisit the issue below.

IV.

DEFENDANT WAS DENIED DUE PROCESS BY FAILURE OF THE COURTS BELOW TO FOLLOW CALIFORNIA SUPREME COURT PRECEDENT

On April 29, 2004, the parties argued and briefed whether the sentence was in excess of the court's jurisdiction, and therefore void, and requested additional time.

The opinion of the Appellate Department filed September 17, 2004, Appendix, p. 1, states "Appellant raises issues regarding the sentence entered on June 20, 2002. The notice of appeal dated April 29, 2004 is untimely, void and of no effect with regard to issues related to that order. The appeal is dismissed to the extent that it seeks to appeal the sentence entered on June 20, 2002."

An order of incarceration on a void sentence is appealable under P.C., § 1466(2)(B). "If, as here assumed, the judgment is void on its face, appellant could have appealed from the order of the respondent

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[20] The court denied the motion to augment on July 12, 2004. The proffer was made to show prejudice, i.e., availability of evidence that should have considered at a P.C., § 1204 hearing.

police court denying his motion to vacate the judgment." *Andrews v. The Police Court Of The City Of Stockton*, 21 Cal. 2d 479 (1943); accord, *People* v. *Zolotoff*, 48 Cal.App.2d 360, 364; *People* v. *Carkeek*, 35 Cal.App.2d 499, 505; P.C., § 1466, subd. 2b. All of this was bought to the Appellate Department's attention by way of a petition for rehearing and the issue raised in the Petition to Transfer to the Third District Court of Appeal.

In view of the unquestioned authority of the California Supreme Court on the subject, either the Appellate Department should have heard the matter on the merits, or the Third District Court of Appeal should, and could, have clarified the law.

Whether the issue is properly before the court is debatable, but it is clear that the first issue under *Morissette* is properly before the court as the highest court from which a review could be had declined to decide the federal issues properly raised below.

CONCLUSION

WHEREFORE, for all, or any one of, the foregoing reasons, this court should grant the petition for writ of *certiorari* to the California Superior Court, County of Sacramento, Appellate Department, and set the matter for briefing and argument and, or *per curiam*, reverse, and remand for further proceedings not inconsistent with this Court's opinion.

Dated: November 9, 2004

RESPECTFULLY SUBMITTED,

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COUNSEL FOR PETITIONER

BEST AVAILABLE COPY

APPENDIX

IN THE

Court of appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

FILED

Oct 21, 2004
COURT OF APPE
THIRD DISTRI
DEENA C.FAWC

BY
Deputy

THE PEOPLE,
Plaintiff and Respondent, v. ROSEMARY PARMAR,
Defendant and Appellant.

C048062
Sacramento County No. 97M12758

BY THE COURT:

Defendant's petition for transfer is denied.

Dated: October 21, 2004

BLEASE, Acting P.J.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO APPELLATE DIVISION

DATE/TIME: October 13, 2004 DEPT. 12A

JUDGE: MARYANNE G. OILLIARD-PRESIDING
JACK SAPUNOR
EMILY E. VASQUEZ

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff/Respondent

VS.

ROSBMARY PARMAR
Defendant/Appellant

Appellate Division No. 97M12758

Superior Court No. 97M12758

NATURE OF PROCEEDINGS: APPEAL FROM THE SUPERIOUR COURT

The Panel has received, read, and considered the Appellant's Petition for Rehearing and Alternative Application for Certification to the Third DCA and now rules as follows:

Appellant's "Petition for Rehearing and Alternative Application for Certification to the Third DCA" is denied."

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO APPELLATE DIVISION

DATE/TIME: SEPTEMBBR 17, 2004 DBPT. 12A

JUDGE: MARYANNE G. OILLIARD-PRESIDING
JACK SAPUNOR
EMILY E. VASQUEZ

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff/Respondent

VS.

ROSBMARY PARMAR
Defendant/Appellant

Appellate Division No.r 97M12758

Superior Court No. 97M12758

NATURE OF PROCEEDINGS: APPEAL FROM THE SUPERIOUR COURT

The above-entitled cause came on for oral argument on SEPTEMBER 17, 2004. The matter was argued to the Court and taken under submission. The Court now rules as follows:

Appellant's notice of appeal filed on April 29, 2004 purported to appeal from "an order dated 4/29/04, made after judgment affecting her rights, to wit a period of incarceration inconsistent with the verdict and record made."
Appellant raises issues regarding the sentence entered on June 20, 2(02. The notice of appeal dated April 29,

2004 is untimely, void and of no effect with regard to issues related to that order. The appeal is dismissed to the extent that it seeks to appeal the sentence entered on June 20, 2002.

This court is not persuaded by appellant's claim that the trial court abused its discretion when it denied her request to continue the hearing so that she could present evidence in mitigation. With regard to that ruling, the trial court is affirmed.

[2]